

Dec 09, 2019

SEAN F. MCAVOY, CLERK

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

THOMAS KRZYMINSKI,

Plaintiff,

v.

SPOKANE COUNTY,

Defendant.

No. 2:19-cv-00238-SAB

**ORDER GRANTING MOTION  
TO DISMISS; CLOSING FILE**

Before the Court is Defendant's Motion to Dismiss Under 12(b)(6), ECF No. 23. A hearing on the motion was held on December 5, 2019, in Spokane, Washington. Plaintiff was represented by Matthew Z. Crotty and Thomas G. Jarrard. Defendant was represented by Paul M. Ostroff and Michael T. Kitson.

Plaintiff Thomas Krzyminski is suing Defendant Spokane County under the Uniform Services Employment and Reemployment Rights Act of 1994 ("USERRA") for alleged violations of the statute relating to missed contributions to the PERS 2 retirement plan after he returned from active duty in 2009. ECF No. 19. Plaintiff is bringing three claims: (1) under § 4318 for failing to make contributions and denying Plaintiff the right to make contributions to the retirement plan by failing to give timely and adequate notice to the plan administrator and denying his service credit for periods of military service; (2) under §§ 4312 and 4313 for failing to properly reemploy Plaintiff in the position of employment with like seniority, status, pay and pension benefits he would have

1 enjoyed if his employment with Defendant had not been interrupted by his  
2 military service; and (3) under §§ 4316 and 4334 by failing to provide adequate or  
3 timely notice of the mandatory restorative pension rights that Plaintiff is entitled  
4 to under USERRA. *Id.*

5 Plaintiff asks the Court to (1) declare that Defendant's denial of Plaintiff the  
6 right to make contributions to a retirement plan, and the failure to give timely and  
7 adequate notice to the plan administrator as required under the USERRA was  
8 unlawful and violated 38 U.S.C. § 4318; (2) order that Defendant take all steps  
9 necessary to give Plaintiff all retirement rights and benefits he is allowed under  
10 USERRA; and (3) order such other relief as may be just and proper. *Id.* He is also  
11 seeking economic damages, double damages, and reasonable attorney and expert  
12 fees.

### 13 **Motion Standard**

14 Under Federal Rule of Civil Procedure 12(b)(6), a district court must  
15 dismiss a complaint if it fails to state a claim upon which relief can be granted. To  
16 survive a Rule 12(b)(6) motion to dismiss, the plaintiff must allege "enough facts  
17 to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*,  
18 550 U.S. 544, 570 (2007). This "facial plausibility" standard requires the plaintiff  
19 to allege facts that add up to "more than a sheer possibility that a defendant has  
20 acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). While courts do  
21 not require "heightened fact pleading of specifics," a plaintiff must allege facts  
22 sufficient to "raise a right to relief above the speculative level." *Twombly*, 550  
23 U.S. at 555.

24 In deciding whether the plaintiff has stated a claim upon which relief can be  
25 granted, the court must assume that the plaintiff's allegations are true and must  
26 draw all reasonable inferences in the plaintiff's favor. *Usher v. City of Los*  
27 *Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). However, the court is not required to  
28 accept as true "allegations that are merely conclusory, unwarranted deductions of

1 fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049,  
2 1055 (9th Cir. 2008).

### 3 **Plaintiff’s Complaint**

4 The following facts are taken from Plaintiff’s Complaint:

5 Plaintiff works as an attorney for Spokane County. During the relevant time  
6 period, he was also a member of the Washington Air National Guard. He was  
7 mobilized on June 1, 2008 in support of Operation Enduring Freedom (“OEF”).  
8 He served on active duty in support of OEF from June 1, 2008 through September  
9 30, 2009 and received an honorable discharge.

10 On November 3, 2009, Plaintiff informed Defendant’s Human Resources  
11 (“HR”) that he had returned from military leave. He asked HR whether his  
12 previously existing benefits would be reinstated.

13 Plaintiff has a membership in the Public Employees’ Retirement System  
14 Plan (PERS 2) retirement plan. Defendant did not tell Plaintiff that he needed to  
15 make any employee contributions to the plan, nor did Defendant allocate the  
16 amount of employer or employee make-up pension contributions. Defendant did  
17 not inform the Department of Retirement Systems (“DRS”) of Plaintiff’s  
18 reemployment within 30 days of his return to work. Defendant also failed to give  
19 Plaintiff pension service credit. Specifically, Plaintiff has not received any pension  
20 service credit for the July 2008 to October 2009 time period.

21 During the mid-2016 timeframe, Plaintiff discovered that Defendant did not  
22 provide him with pension service credit for the July 2008 to October 2009 time  
23 period when he was on military leave of absence. Plaintiff notified HR of these  
24 omissions and HR told him to contact the DRS to rectify the situation. Plaintiff  
25 notified DRS of the issue and requested that he be given pension service credit.  
26 DRS told Plaintiff that his claim was untimely because he missed the five-year  
27 statutory cut-off required under state law. DRS gave Plaintiff the option of  
28 purchasing the credit for approximately \$85,000.

1 Plaintiff appealed the DRS's decision, which was denied. DRS concluded  
2 that Plaintiff failed to make his employee contribution to his PERS 2 account  
3 within five years of his return to work as required by Wash. Rev. Code §  
4 41.40.710.

### 5 **Uniform Services Employment and Reemployment Rights Act (USERRA)**

6 Federal law provides protections for persons who leave civilian careers and  
7 employment to serve in the uniform services. 38 U.S.C. § 4301. Congress enacted  
8 ESERRA (1) "to encourage noncareer service in the uniformed services by  
9 eliminating or minimizing the disadvantages to civilian careers and employment  
10 which can result from such service"; (2) "to minimize the disruption" to the lives  
11 of servicemembers and their employers "by providing for the prompt  
12 reemployment of such persons upon their completion of such service"; and (3) to  
13 prohibit discrimination against servicemembers. 38 U.S.C. § 4301(a).

#### 14 **1. 38 U.S.C. § 4312 & 4313**

15 Section 4312 of USERRA provides a right to reemployment for members of  
16 the armed services who comply with statutory notification requirements. 38  
17 U.S.C. § 4312; *Wallace v. City of San Diego*, 479 F.3d 616, 625 (9th Cir. 2007).  
18 Compensatory damages for failing to reemploy a person in violation of section  
19 4312 are governed by § 4323(d)(1)(B), which imposes no time limit. *Wallace*, 479  
20 F.3d at 625; *see also Francis v. Booz, Allen & Hamilton, Inc.*, 452 F.3d 299, 304  
21 (4th Cir. 2006)

22 For returning veterans who were deployed for over 90 days, reemployment  
23 is to "the position of employment in which the person would have been employed  
24 if the continuous employment of such person with the employer had not been  
25 interrupted by such service, or a position of like seniority, status and pay, the  
26 duties of which the person is qualified to perform." 38 U.S.C. § 4313(a)(2)(A).

27 Regulations promulgated under USERRA note that generally, "the  
28 employee is entitled to reemployment in the job position that he or she would have

1 attained with reasonable certainty if not for the absence due to uniformed service.”  
2 20 C.F.R. § 1002.191. This position is referred to as the “escalator position.” *Id.*  
3 The principle behind the escalator position is that, if not for the period of  
4 uniformed service, the employee could have been promoted (or, alternatively,  
5 demoted, transferred, or laid off) due to intervening events. *Id.* The escalator  
6 principle requires that the employee be reemployed in a position that reflects with  
7 reasonable certainty the pay, benefits, seniority, and other job perquisites, that he  
8 or she would have attained if not for the period of service. *Id.* Depending upon the  
9 specific circumstances, the employer may have the option, or be required, to  
10 reemploy the employee in a position other than the escalator position. *Id.*

11 The reemployment rights protected by §§ 4312 and 4313 apply only at the  
12 instant of reemployment; other sections of USERRA operate to protect employees  
13 after they are properly reemployed. *Francis*, 452 F.3d 299 at 304. (“In short, §  
14 4312 requires an employer to rehire covered employees; § 4311 then operates to  
15 prevent employers from treating those employees differently after they are  
16 rehired; and § 4316 prevents employers from summarily dismissing those  
17 employees for a limited period after they are rehired. While combining to form  
18 comprehensive protection from the point of rehire to untimely dismissal, each  
19 provision is nonetheless functionally discrete.”).

## 20 **2. 38 U.S.C. § 4316**

21 Section 4316(b)(1) requires employees on military leave to be provided  
22 with comparable rights and benefits to which those on non-military absences are  
23 entitled. 38 U.S.C § 4316(b)(1). If a right and benefit is not provided to an  
24 employee on a non-military related absence, the right or benefit is not due the  
25 employee on military leave. § 4316(b)(3); 20 C.F.R. § 1001.149.

26 Specifically, a service member who is reemployed “is entitled to the  
27 seniority and other rights and benefits determined by seniority that the person had  
28 on the date of the commencement of service in the uniformed services plus the

1 additional seniority and rights and benefits that such person would have attained if  
2 the person had remained continuously employed.” 38 U.S.C. § 4316(a). “In  
3 determining entitlement to seniority and seniority-based rights and benefits, the  
4 period of absence from employment due to or necessitated by uniformed service is  
5 not considered a break in employment.” 20 C.F.R. § 1002.210. While on active  
6 duty, the service member is generally to be “deemed to be on furlough or leave of  
7 absence.” 38 U.S.C. § 4316(b)(1)(A). Service members are additionally:

8       Entitled to such other rights and benefits not determined by seniority as  
9       are generally provided by the employer of the person to employees  
10       having similar seniority, status, and pay who are on furlough or leave of  
11       absence under a contract, agreement, policy, practice, or plan in effect  
12       at the commencement of such service or established while such person  
13       performs such service.

14 38 U.S.C. § 4316(b)(1)(B).

15       Section 4316(c) temporarily changes the at-will employment status of  
16       returning veterans. *Francis*, 452 F.3d at 308. For a certain period of time  
17       (dependent on the veteran’s length of military service), an employer cannot  
18       discharge the returning veteran “except for cause.” *Id.*

19       Section 4316 does not cover employee pension benefit plans.<sup>1</sup> § 4316(b)(B).

### 20 **3.     38 U.S.C. § 4318**

21       Section 4318 of USERRA governs pension plans for returning veterans. 38  
22       U.S.C. § 4318. An employer reemploying a veteran shall “be liable to an  
23       employee pension benefit plan for funding any obligation of the plan . . . and shall  
24       allocate the amount of any employer contribution for the person in the same  
25       manner and to the same extent the allocation occurs for other employees during  
26       the period of service.” 38 U.S.C. § 4318(b)(1). Under 38 U.S.C. § 4318(b)(1), a  
27       person reemployed under this chapter shall be treated as not having incurred a

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28 <sup>1</sup> 38 U.S.C. § 4316(b) states: (6) The entitlement of a person to a right or benefit  
under an employee pension benefit plan is provided for under section 4318.

1 break in service with the employer maintaining a pension benefit plan due to  
2 service in the uniformed services. This section specifically provides that:

3       Each period served by a person in the uniformed services shall, upon  
4       reemployment under this chapter, be deemed to constitute service with  
5       the employer . . . maintaining the plan for purposes of  
6       nonforfeitability of the person's accrued benefits and for the purpose  
7       of determining accrued benefits under the plan.

8 38 U.S.C. § 4318(a)(2)(B).

9       The section also provides that a service member reemployed under this  
10      chapter may obtain retirement service credit under a contributory pension plan by  
11      making up his or her missed contributions to the plan within five years of  
12      reemployment, but only to the extent the person makes payments to the plan. 38  
13      U.S.C. § 4318(b)(2). Such makeup contributions may not exceed the amount the  
14      persons would have made if the person had remained continuously employed  
15      throughout the period of service. *Id.*

16 20 C.F.R. § 1002.261 provides:

17       With the exception of multiemployer plans, which have separate  
18       rules discussed below, the employer is liable to the pension benefit  
19       plan to fund any obligation of the plan to provide benefits that are  
20       attributable to the employee's period of service. In the case of a  
21       defined contribution plan, once the employee is reemployed, the  
22       employer must allocate the amount of its make-up contribution for  
23       the employee, if any; his or her make-up employee contributions, if  
24       any; and his or her elective deferrals, if any; in the same manner and  
25       to the same extent that it allocates the amounts for other employees  
26       during the period of service. In the case of a defined benefit plan, the  
27       employee's accrued benefit will be increased for the period of service  
28       once he or she is reemployed and, if applicable, has repaid any  
29       amounts previously paid to him or her from the plan and made any  
30       employee contributions that may be required to be made under the  
31       plan.

32 § 1002.261.

33 20 C.F.R. § 1002.262(a) provides that "The employer is not required to  
34 make its contribution until the employee is reemployed." Subsection (b)

1 specifically provides an employee is “allowed (but not required) to make up his or  
2 her missed contributions.” § 1002.262(b). Under subsection (c), if an employee  
3 does not make up his or her contributions, he or she will not receive the employer  
4 match or accrued benefits attributable to his or her contribution because employer  
5 contributions are contingent on or attributable to the employee makeup  
6 contributions. § 1002.262(c).

#### 7 **4. Other provisions**

8 38 U.S.C. § 4334(a) requires:

9 (a) Requirement to provide notice.--Each employer shall provide to  
10 persons entitled to rights and benefits under this chapter a notice of  
11 the rights, benefits, and obligations of such persons and such  
12 employers under this chapter. The requirement for the provision of  
13 notice under this section may be met by the posting of the notice  
14 where employers customarily place notices for employees.

15 38 U.S.C. § 4327(b) states:

16 (b) Inapplicability of statutes of limitations.--If any person seeks to  
17 file a complaint or claim with the Secretary, the Merit Systems  
18 Protection Board, or a Federal or State court under this chapter  
19 alleging a violation of this chapter, there shall be no limit on the  
20 period for filing the complaint or claim.

21 USERRA “supersedes any State law (including any local law or ordinance),  
22 contract, agreement, policy, plan, practice, or other matter that reduces, limits, or  
23 eliminates in any manner any right or benefit provided by [USERRA], including  
24 the establishment of additional prerequisites to the exercise of any such right or the  
25 receipt of any such benefit.” 38 U.S.C. § 4302(b).

26 Even though courts should construe certain veterans’ statutes liberally, they  
27 are not permitted to create rights out of whole cloth. *Bowlds v. General Motors*  
28 *Mfg. Div. of General Motors Corp.*, 411 F.3d 808, 812 (7th Cir. 2005).

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## Washington Law

The Washington State Legislature (legislature) enacted Wash. Rev. Code Chapter 73.16 to comply with federal law. The legislature expressed its intent as follows:

(1) It is the intent of the legislature to guarantee employment rights of members of the reserve and national guard forces who are called to active duty. The federal uniformed services employment and reemployment rights act of 1994 protects all such federal personnel. The legislature intends that similar provisions should apply to all such state personnel. Therefore, the legislature intends for chapter 133, Laws of 2001 to ensure protections for state-activated personnel similar to those provided by federal law for federal-activated personnel.

(2) The purposes of this chapter are to:

(a) Encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment that can result from such service;

(b) Minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(c) Prohibit discrimination against persons because of their service in the uniformed services.

Wash. Rev. Code § 73.16.005.

Under Wash. Rev. Code § 73.16.055(1)(b), a person “reemployed under this chapter shall be treated as not having incurred a break in service with the state because of the person’s period of service in the uniformed services.”

For contributory employee pension plans:

A person reemployed by the state under this chapter is entitled to accrued benefits ... that are contingent on the making of, or derived from, employee contributions ... only to the extent the person makes payment to the plan with respect to such contributions or deferrals. No such payment may exceed the amount the person would have been permitted or required to contribute had the person remained

continuously employed by the state throughout the period of uniformed service. Any payment to the plan described in this subsection shall be made during the period beginning with the date of reemployment and whose duration is three times the period of the person's services, such payment period in the uniformed services, not to exceed five years.

Wash. Rev. Code § 73.16.055(3).

Wash. Rev. Code Chapter 41.40 governs the administration of PERS plans: Plan 1, Plan 2, and Plan 3. Under Wash. Rev. Code § 41.40.170, a plan member who leaves an employer to enter military service “shall be deemed to be on military leave of absence.”

Wash. Rev. Code § 41.40.710(4) provides that a plan member who leaves employment to enter active duty in the military “shall be entitled to retirement service credit for up to five years of military service.” It also directs that this subsection “shall be administered in a manner consistent with the requirements of USERRA.” *Id.* To qualify for retirement service credit, the member must apply “for reemployment with the employer who employed the member immediately prior to the member entering uniformed service within ninety days of the member’s honorable discharge from uniformed service. Wash. Rev. Code § 41.40.710(4)(a)(i). In addition, this statute requires the member to exercise one of three options to qualify for service credit as follows:

(ii) The member makes the employee contributions required under RCW 41.45.061 and 41.45.067 within five years of resumption of service or prior to retirement, whichever comes sooner; or

(iii) Prior to retirement and not within ninety days of the member’s honorable discharge or five years of resumption of service [employment] the member pays the amount required under RCW 41.50.165(2); or

(iv) Prior to retirement the member provides to the director proof that the member’s interruptive military service was during a period of war as defined in RCW 41.04.005. . .

Under the first option, a qualifying member pays the employee contributions

1 at the required contribution rates for Plan 2 in effect during the time period in  
2 question. In other words, the qualifying member's makeup contributions are the  
3 same as the contributions he would have made if he had continued his employment  
4 uninterrupted. The second option provides an additional benefit for a member who  
5 do not otherwise qualify for retirement service credit under Wash. Rev. Code §  
6 41.40.710(4)(a)(i) and (ii). This additional benefit, however, includes an increase  
7 in cost for makeup contributions, which are calculated at the actuarial value of the  
8 resulting increase in benefit. The third option allows a member to obtain service  
9 credit for interruptive military service at no cost if the member provides proof prior  
10 to retirement that the member's military service was during a period of war.

### 11 **Analysis**

#### 12 **1. Count 1, Violation of 38 U.S.C. § 4318**

13 Plaintiff's claim under § 4318 is not whether Plaintiff was required to make  
14 up his employee contribution in order to get service credits. Case law is clear that  
15 he needs to do that. The question instead is whether Spokane County had a duty to  
16 tell him that he needed to do so. The answer is no. The USERRA does not  
17 mandate that an employer must notify the employee to tell him how much he  
18 needed to pay to make up the contributions or to automatically take out the  
19 amount the employee owed to make up the payments from his paycheck if the  
20 employee's prior contributions were previously automatically taken out.

21 Although Plaintiff alleges that PERS 2 is a multiemployer, defined  
22 contribution plan, it is not. Rather, PERS 2 is a defined benefit plan. Thus, 20  
23 C.F.R. § 1002.261 allocation requirements do not apply and do not create a notice  
24 requirement on the part of the employer. Nor does the Fact Sheet relied on by  
25 Plaintiff create an affirmative duty on the part of the employer to notify the  
26 employee that a make-up contribution is required to maintain service credits  
27 during military leave and how and when to make up the contribution.

28 Notably, a DRS publication states that in order to recover interruptive

1 military service credit, an employee must do four things: (1) Leave DRS-covered  
2 employment to serve in one of the armed forces of the United States; (2) Receive  
3 an honorable discharge; (3) Return to employment with their DRS-covered  
4 employer within 90 days of leaving military service; and (4) Send DRS a copy of  
5 the employee's DD214, or Certificate of Release or Discharge from Active Duty.  
6 ECF No. 24, Ex. 3. After receiving the documents, DRS reviews the documents  
7 and employment history and notifies the employee of its findings. *Id.* Also, the  
8 DRS website instructs employees who wanted to find out if they are eligible to  
9 receive interruptive service credit to send their request for a determination along  
10 with documentation of their military service to the DRS for review. ECF No. 24,  
11 Ex. 4. In his First Amended Complaint, Plaintiff alleged facts that meet the first  
12 three requirements but there is nothing in the record indicating he complied with  
13 the fourth.

14 Plaintiff has failed to allege a violation of 38 U.S.C. § 4318.

15 **2. Count 2, 38 U.S.C. §§ 4312 & 4313**

16 The Court adopts the reasoning of the Fourth Circuit in concluding that the  
17 employment rights protected by §§ 4312 and 4313 apply only at the instant of  
18 reemployment, and that other sections of USERRA operate to protect employees  
19 after they are properly reemployed. *See Francis*, 452 F.3d at 304; *see also Bowlds*,  
20 411 F.3d at 813 (“Simply put, by rehiring Mr. Bowlds immediately after his  
21 discharge from the Army in 1969, General Motors fulfilled its obligations under  
22 the VRRRA.”). Plaintiff has failed to allege a violation of 38 U.S.C. §§ 4312 and  
23 4313.

24 **3. Count 3, 38 U.S.C. §§ 4316 and 4334**

25 38 U.S.C. § 4316(b)(6) states that the entitlement of a person to a right or  
26 benefit under an employee pension benefit plan is provided for under § 4318.  
27 Thus, Plaintiff's claim regarding his right or benefit under PERS 2 is governed by  
28 § 4318, not § 4316. Plaintiff's arguments that § 4316(b)(2)(B) creates an

1 affirmative duty on the part of an employer to notify an employee of his  
2 obligations to make up contributions to the pension benefit plan is without merit.

3 Moreover, Plaintiff has failed to allege facts that Defendant failed to post  
4 the required notice. While he takes issue with the content of the notice and asserts  
5 that the notice should have informed employees of their obligations to make up  
6 contributions to their pension benefit plan, this argument is not supported by the  
7 regulations or statutes. There is no affirmative duty in USSERA that requires an  
8 employer to provide notice regarding pension restoration.<sup>2</sup>

9 Accordingly, **IT IS HEREBY ORDERED:**

10 1. Defendant's Motion to Dismiss, ECF No 23, is **GRANTED**.

11 2. Defendant's Motion to Dismiss, ECF No. 12, is **DENIED**, as moot.

12 3. The District Court Executive is directed to enter judgment in favor of  
13 Defendant and against Plaintiff.

14 **IT IS SO ORDERED.** The Clerk of Court is directed to enter this Order,  
15 forward copies to counsel, and close the file.

16 **DATED** this 9th day of December 2019.



20  
21

A handwritten signature in blue ink, reading "Stanley A. Bastian", is written over a horizontal line.

22 Stanley A. Bastian  
23 United States District Judge

24 <sup>2</sup> While the Court is sympathetic to Plaintiff's suggestions that the email response  
25 to his questions concerning restoration of his benefits was inadequate or  
26 incomplete, Plaintiff has failed to allege such a claim. In any event, given that there  
27 is no longer federal subject matter jurisdiction, the Court will not entertain any  
28 amendments to the Complaint.